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IN THE

Supreme Court of the United States

OCTOBER TERM 1932.

RAYMOND J. FUNKHOUSER and ELMER N. FUNKHOUSER, doing business under the firm name and style of R. J. FUNKHOUSER AND CO.,

Appellants,

v.

J. B. PRESTON COMPANY, INC.,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL UPON THE JURISDICTIONAL STATEMENTS

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against

J. B. PRESTON COMPANY, INC.,
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BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL UPON THE JURISDICTIONAL STATEMENTS.

Appellee has moved under Rule 12 of the Rules of this court to dismiss the appeal of the appellants herein upon four grounds which will hereinafter be referred to.

Statement of Jurisdictional Facts.

Appellee brought an action in the Supreme Court of the State of New York, New York County for damages alleged to have been suffered by it due to appellants' breach of a contract entered into in the year 1923. The contract was to be performed during the years 1923 to 1926, inclusive. This is conceded in appellee's motion to dismiss. The Trial Court assessed damages against appellants in the sum of $45,889.70 together with interest in the sum of $14,417.57 and judgment was thereupon entered in the total sum of $60,307.27 on the 12th day of May, 1930.

The damages were assessed upon the difference between the cost of production and the contract price, and were, therefore, unliquidated. Prior to the enactment of the amendment of 1927 hereinafter referred interest was not allowed upon actions for breach of contract when the damages were unliquidated. *Gray* v. *Central Railroad Co. of N. J.*, 157 N. Y. 482; *Faber* v. *City of New York*, 222 N. Y. 255. This was assumed and conceded in the courts below. (See *Preston* v. *Funkhouser*, 235 App. Div. [N. Y.] 200; and 261 N. Y. 140, 142.)

Thereafter appellants duly appealed from each and every part of said judgment to the Supreme Court of the State of New York, Appellate Division, First Department. Said Appellate Division modified said judgment by striking out the allowance of interest, upon the ground that the obligation of such contract would be thereby impaired. (*Preston* v. *Funkhouser*, 235 App. Div. 200, 261 N. Y. 140, 143.)

The statute drawn in question upon which the Trial Court allowed interest is Section 480 of the New York Civil Practice Act (Chapter 925 New York Laws 1920) as amended by Chapter 623 of the Laws of 1927 in effect April 4, 1927. Said statute as so amended reads as follows:

> "Interest to be included in recovery. Where *in any action* final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the *total amount* awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the *total amount* awarded, and included in the amount of the judgment. *In every action now pending or hereafter brought wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or im-*

plied, other than a contract to marry, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded." (Italicized portions indicate the amendment in effect April 4, 1927.)

The said Appellate Division in striking out the interest so allowed quoted from *Sweeney* v. *State of New York*, 225 App. Div. 606 (reversed by Court of Appeals 251 N. Y. 417, upon the ground that the State of New York could not object to the unconstitutionality of the statute): "* * * 'The matter of interest allowed involved a substantial right, and not merely a question of procedure. Statutes are presumptively applicable in futuro only. *Jacobus* v. *Colgate*, 217 N. Y. 235 * * *.'"

On appeal to the Court of Appeals of the State, that being the court of last resort in the State of New York, the appellee cross appealed from so much of the judgment and order of the Appellate Division as struck out the interest.

The Court of Appeals, Judge LEHMAN dissenting, modified the judgment of the Appellate Division by restoring the interest disallowed and as so modified affirmed. (261 N. Y. 140.) The Court of Appeals considered question of whether Section 480 of the New York Civil Practice Act as amended in 1927 was constitutional under Article I, Section 10 of the United States Constitution. Page 143, Mr. Chief Judge POUND stated:

> "The court below has held that so much of the statute as makes it compulsory to allow interest on unliquidated claims cannot apply to a claim for unliquidated damages on a contract entered into before April 4, 1927, as the obligation of such contract would be thereby impaired. * * *
>
> "'No State shall * * * pass any * * * Law impairing the Obligation of Contract.' U. S. Const., art. 1, 10' * * *."

The Court of Appeals thereupon proceeded to hold that said Section 480 of the Civil Practice Act was remedial and therefore did not violate the United States Constitution, stating:

Page 14:

> "* * * It follows that section 480 is a remedial statute to be construed, according to its literal meaning, to apply to all actions brought after it went into effect * * *. It changes an existing right of action rather than creates a new right * * *."

The order and judgment of the said Court of Appeals was thereafter made the order of the Supreme Court of the State of New York, New York County and judgment was thereafter entered thereon in the said Supreme Court.

The Chief Judge of the said Court of Appeals thereafter duly permitted appellants to appeal to this court from so much of its decision and judgment as modified the judgment of the said Appellate Division and restored the interest struck out by said Appellate Division.

Appellants have been unable to find a decision by this court construing the validity of a state statute which allows interest upon the principal amount recovered for breach of contracts entered into prior to its enactment where, prior to the enactment no interest was allowed to be recovered and incorporated in the judgment. In *Supreme Ruler of the F. M. C.* v. *Snyder*, 227 U. S. 292, this court stated:

> "* * * Nor does the statute permit a recovery of expenses or added damages as a mere consequence of success in the suit. *The question whether the state may so provide as to prior contracts is not before us, and we express no opinion upon it.*" (Italics ours.)

The validity of said Section 480 was drawn in question on the ground of its being repugnant to the Consti-

tution of the United States, so far as the same affected the contract in question, and this question was duly considered and decided by said Appellate Division, and by said Court of Appeals, and the latter court upheld its validity.

The amount of interest in the present case is $14,417.57 a substantial amount, and if the appellants are compelled to pay interest as decided by the New York Court of Appeals, the obligation of their contract will be diminished and impaired (*U. S. Constitution,* Art. I, §10) and appellants will be deprived of property without due process of law (*U. S. Const.* 14th Amendment).

These points were included in appellants' assignment of errors on this appeal.

The right of the United States Supreme Court to review the judgment of the Court of Appeals of the State of New York as entered in the Supreme Court of the State of New York, New York County, was established in the following cases: *Edwards* v. *Kearzey,* 96 U. S. 595; *Home Insurance Co.* v. *Dick,* 281 U. S. 397, 50 Supreme Court 338; *McCullough* v. *Virginia,* 172 U. S. 102, 19 Supreme Court 134. (See also cases cited in Appellants' Jurisdictional statement pursuant to Rule 12 of this Court.)

POINT II.

Appellants' Answer to appellee's points objecting to the jurisdiction of this Court.

I. Under its first objection the appellee makes three points:

(a) The first is that the contract contained no obligation that the appellants would not pay interest. In the first case cited by appellee *Missouri, etc. Co.* v. *Sebastian,* 249 U. S. 170, this court, quoting from *Morley* v. *Lakeshore Railroad Co.,* 146 U. S. 162, stated that:

> "* * * The discretion exercised by the legislature in prescribing what, if any, damages shall be paid by way of compensation for delay in the payment of *judgments* is based on reasons of public policy *and is altogether outside the sphere of private contracts* * * *." (Italics ours.)

These cases are therefore not applicable to the present case.

(b) Appellee contends that the statute in question does not "impair" any obligation of the contract, but no cases are cited to sustain this statement.

(c) Appellee contends that the statute in question is remedial in its nature.

However, this court, in *Edwards* v. *Kearzey*, 96 U. S. 595, 607 stated:

> "The importance of the point involved in this controversy induces us to restate succinctly the conclusions at which we have arrived, and which will be the ground of our judgment.
>
> The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void."

II. Appellee contends that the New York Court of Appeals has held that the contract in question conferred no right which the statute took away so as to impair the obligation of the contract in question.

Nowhere in the opinion of Chief Judge POUND, *261 N. Y. 140*, does the Court of Appeals deny that the con-

tract in question conferred a right which was destroyed or impaired the obligation of the contract. It was held below that the statute in question was remedial (see p. 4 of this brief). In the case relied upon by appellee, *Missouri Interurban Railway Co.* v. *Olathe*, 222 U. S. 187, the obligation in question was a resolution and this court stated:

> "* * * No effect whatever has been given to it by the State court and this court is without jurisdiction to review its judgment * * *."

In the present case it clearly appears from the decision of the New York Court of Appeals that there was only one ground upon which this case was decided by that court, that is, that the said Amendment of 1927 was remedial (see 261 N. Y. 140 at 145) and did not violate the Constitution of the United States.

The questions of whether the present statute is remedial, and also, assuming the statute in question is remedial, whether it substantially impairs and lessens the value of a contract, are properly before this court.

Edwards v. *Kearzey, supra.*

III. Appellee states that the constitutional question was not properly reserved.

The laws of the State of New York do not provide for a bill of exceptions upon appeal. The *General Laws of New York*, 1920, Chapter 925, Section 562, provides that:

> "An appeal must be taken by serving upon the attorney for the adverse party, and upon the clerk with whom the judgment or order appealed from is entered by filing in his office, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof."

The constitutional question was considered by the Appellate Division, 235 A. D. 200, and by the Court of Appeals in *261 N. Y. 140.*

In *Rothschild* v. *Knight,* 184 U. S. 334, 22 Supreme Court 391, 393, this court stated:

> "A motion is made to dismiss the writ of error upon the ground that no Federal question was raised in the superior court. Federal questions were raised, however, on writ of error to the supreme court, and that, we think, was a sufficient claim. Meyer v. Richmond, 172 U. S. 82, 43 L. Ed. 374, 19 Sup. Ct. Rep. 106; Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. Ed. 243, 6 Sup. Ct. Rep. 1023; Sully v. American Nat. Bank, 178 U. S. 289, 44 L. Ed. 1072, 20 Sup. Ct. Rep. 935."

In the present case, appellants' notice of appeal in the Appellate Division properly raised all errors. The Appellate Division considered the question now raised in this court and decided it in favor of appellants. Appellee appealed to the Court of Appeals from that part of the judgment of the Appellate Division. The Court of Appeals reversed the Appellate Division. The question is therefore properly before this court as it was squarely passed upon and decided as a question under the United States Constitution.

The cases relied upon by appellee in this connection are cases where the intermediate appellate courts did not pass upon the federal or constitutional questions or were cases where bills of exceptions were required and the federal and/or constitutional questions were not presented by the bill of exceptions, or considered by the Appellate Court.

IV. For an answer to appellee's fourth contention that it does not appear on which of two grounds the

judgment of interest was based it is sufficient to state that the Appellate Division stated:

> "* * * Interest was allowed on unliquidated damages. That this claim was clearly unliquidated appears to be beyond question * * *."

The *New York Court of Appeals*, 261 N. Y. 140 at 142 stated:

> "The question arises in this cases of the effect of section 480 of the Civil Practice Act, as amended by chapter 623 of the Laws of 1927, in effect April 4, 1927, on contracts entered into prior to that date, when at the time of the trial the principal sum is unliquidated."

Page 143:

> "The court below has held that so much of the statute as makes it compulsory to allow interest on unliquidated claims cannot apply to a claim for unliquidated damages on a contract entered into before April 4, 1927, as the obligation of such contract would be thereby impaired."

CONCLUSION.

Appellee's motion to dismiss should be denied with costs and disbursements.

Respectfully submitted,

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